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Why is it called The Roberts Court?

The name seems fundamentally misleading. Empirically, the Court is dominated by Justice Kennedy, who often finds himself the fifth vote in the Court’s famous 5-4 splits. Surely it is his influence that most defines this era on the Supreme Court? We do not name it for its newest members, Sotomayor and Kagan, although both appear to be persuadable, and thus influential, votes for disputes over civil liberties. And Alito has dramatically changed the calculus of appellate litigation; replace O'Connor’s moderation with Alito’s zeal in the equation, and the result must be more conservative. Yet we don’t call it the Alito court. Why do we not name it for its veterans, Scalia and Ginsburg, Thomas and Breyer? They have spent decades building mountains of precedent that should, theoretically, constrain the Court’s decisions.

It is the Roberts Court because Justice John G. Roberts, Jr. brought something new to the Court. The Rehnquist Court was, as Craig Green describes in this volume, in a sort of stasis. Its membership did not vary, and its opinions, though not always predictable, had a certain natural cadence flowing through the worn channels of the status quo. Under Justice Roberts, the Court has awoken from that stasis — and it’s making up for lost time.

The Court’s death-march through Warren Court precedent has been a surprising success. Overruling cases has all the subtlety of throwing a brick through a window. The Roberts Court has found a better way to delete Constitutional rights for women, minorities, and those accused of crimes — it nullifies Warren Court precedent by creating specious distinctions or enormous exceptions. These quiet victories over liberal law have been punctuated by deafening routs in major cases like Heller, Parents Involved, and of course Citizens United.

This is what John Roberts has brought to the Court — change. Handsome, intellectually consistent, and, most importantly, young, Roberts can sell the conservative brand in a way his colleagues and predecessors never could. And he can do it for a long time; only Kagan is younger on the current bench. His presence on the Court has led to crucial achievements for the conservative movement. Observers now wonder what objective the Court will complete next- liberals with...
fear, conservatives with hunger. In this era of change, virtually every-
thing is in play.

The conceit that the Supreme Court is not a ‘political’ branch of
government is, at best, silly. Political battles in the Court have more
impact than any dogfight over a congressional seat, and in some cases
more lasting effect than partisan control of the White House. Nor is
the political dimension of the Court a recent development. Presidents
from Andrew Jackson to Franklin Delano Roosevelt sparred with the
Supremes, and this year marks the 25th anniversary of Robert Bork’s
failed nomination.

Thus Supreme Court politics are neither good nor bad. The Court
simply is political, whatever its representations. Yet the word ‘activ-
ism’ is anathema, so the conceit of an apolitical Supreme Court has
become more important than ever. How then does the Roberts Court
reconcile changes in the law with its allegedly apolitical values? These
pieces question the Court’s avowed neutrality. Michael Gerhardt’s
piece does this with considerably more discretion than I do, aiming a
critical eye at the ‘modesty’ of recent decisions in both form and sub-
stance. Craig Green examines the Erie Doctrine in light of recent
Roberts Court developments, looking closely at the mechanically
complex Shady Grove opinion in an effort to augur the future of the
Court.

Joseph Blocher looks directly at our title character. Blocher con-
siders how personal victories before the Rehnquist Court have shaped
the Chief Justice’s written product, and now shape his victories over
the Warren Court.

Both Russell Mangas and Gene Nichols examine Citizens United,
the case that will define the Roberts Court until the next most-fa-
mous-case comes along. Mr. Mangas is particularly interested in the
decision’s effect on dissenting shareholders, a class of person that is
intellectually fascinating to consider and very unlucky to be in the
wake of Citizens United. Mr. Nichols captures the anger and shock
cases like Citizens and Heller unleash, while tearing away the flimsy
intellectual camouflage of these opinions to expose the partisanship
beneath. Many echo his sentiments.

The Court has always been political. These political calculations
dwell not just in Lochner, Roe, or Dred Scott, and not just in the Cher-
okee Cases, Lawrence v. Texas, or Bush v. Gore. They underlie every
decision of the Court, from the most tedious circuit split to the most
crucial election dispute. At the same time, no matter what its composition, the Court assures the world that it does not play politics. The Roberts Court is simply very good at negotiating this contradiction. And whether you call him an activist or a hero, a judge or a politician, John Roberts is going to be running the Court that bears his name for a long, long time.

—Jason McVicker
Editor in Chief
Tulsa Law Review